Chapter 7

Controlling Efficient Conduct and Quality of the Proceedings*

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1. MAJOR ADVANTAGES OF ARBITRATION

It is like a mantra repeated by every author and commentator on arbitration that arbitration offers parties a more efficient way to resolve disputes which, in addition, has the potential to lead to more satisfactory outcomes in terms of the quality of the decisions. This argumentation aims at convincing contract parties to chose arbitration not only because arbitration provides for a neutral forum (as an alternative to litigating in the home courts of one of the parties), but also because arbitration is somehow a quality-wise superior method. As far as efficiency is concerned, two advantages are pointed out usually, namely on one hand that arbitration is faster than court procedures (i.e. it takes less time until an enforceable decision has been reached), and that resources are spent in a more economical way.

Already the general title of this Conference (Arbitral Institutions under Scrutiny) indicates that the general praise of arbitration is not shared universally, and that there are critical voices as well. I would in fact submit that all of the above arguments could be countered with actual cases where the opposite was true. Just use the opportunity of one of the many arbitration conferences and listen to the war stories shared by seasoned practitioners—of course none of which would be repeated on a panel.

The aim of this article is to give hints how arbitral institutions could contribute to deflecting and hopefully eliminate the critical voices against arbitration. Or, should we simply accept that, in spite of advantages such as enforceability of decisions under the New York Convention, neutrality and confidentiality, arbitration is about to lose

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* The following are personal views of the author, as expressed as an introduction to the panel discussion with the topic "Supervision and Quality Control". They are not meant to be an academic analysis of arbitration, arbitrators or the work done by arbitration institutions.

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its reputation due to the fact that it is not as efficient as it was once said to be?

1.1. Growing Criticism

1.1.1. Complaints about the complexity of the proceedings and the overall time it takes until a decision is rendered

The criticism levied at arbitration can be summarized with the statement "arbitration has evolved to US off-shore litigation"[2]. This indicates that arbitration proceedings have acquired, over the course of the years, features of litigation US style[3] which is, from many users' perspective, exactly what they wished to avoid when they chose arbitration. The elements of US litigation that have crept into arbitration proceedings are not only discovery (via document production, as reflected in the now almost universally recognized IBA Guidelines on Evidence in Arbitration), but also the fact that counsel use styles and tactics familiar from litigation. Among those are overly lengthy submissions, a plethora of exhibits related to points that might or might not be in dispute, long-winded witness statements full of arguments (instead of just factual observations), lengthy direct and cross-examination of witnesses not clearly focused on the core issues in dispute, and all sorts of dilatory tactics, including challenges of arbitrators, experts and opposing counsel.

It is interesting to note, in that context, that criticism is sometimes raised by the same colleagues who act as counsel in arbitration proceedings, and in that capacity do not contribute to efficient proceedings by using the very tactics they otherwise criticize. Similarly paradox is that parties involved in arbitration proceedings are dissatisfied within the glacial course of their arbitration, ignoring that they are in fact the masters of the proceedings and, through control over counsel, could influence the way proceedings are run.

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[2] International Arbitration loses its Grip – Are U.S. lawyers to blame?, ABA Journal, April 2010 Issue.

[3] Sometimes referred to as "Americanization of international arbitration", see Jacobs/Paulson, The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration, Texas International Law Journal, 43:359 et seq.; Helmer, International Commercial Arbitration: Americanized, "Civilized", or Harmonized, 19 Ohio St. J. on Disp. Resol., 35 et seq.

1.1.2. Complaints about the quality of the work of arbitrators are heard less frequently

It is certainly positive that, while lack of efficiency and the resulting cost of arbitration are often mentioned, one hears relatively rarely criticism against the quality of the work of arbitral tribunals and the outcome of cases as reflected in the awards rendered by arbitral tribunals. If one hears such arguments, they are sometimes from parties who have lost a case, and their perception of the work of the tribunal might well be tainted by the outcome of the case. This is an individual experience many counsel make: the better their party fares in the decision, the more enthusiastic the assessment of the work of the arbitrators is.

1.1.3. Among the reasons identified for lack of efficiency, institutions are not mentioned

Interestingly, when one goes through literature and publications discussing the state of arbitration these days, one does not find the suggestion that it is actually the fault of arbitral institutions; they are not blamed for those developments that are considered problematic. This is noteworthy because it is constantly one of the arguments made in favor of institutional arbitration (vis-à-vis ad hoc arbitration) that the institutions play an important role in ensuring quality of the proceedings[4]. If that is a correct statement, one has to wonder why the arbitration institutions are then not to be blamed if proceedings do not run smoothly.... Is it because they are really not at fault, is it because they do not have the influence to change the course of specific arbitration proceedings, or is it simply because so far the spotlight was not on the institutions? The fact that this Conference looks at the role of institutions is certainly an encouraging display of self-criticism and willingness to accept responsibility—and creates confidence in amendments and improvements that might take

[4] "The main advantages of international arbitration are the existence of ... trained staff to ensure ... that the arbitration runs as smoothly as possible", Schlaepfer/Girod, Institutional vs. ad hoc Arbitration, in: International Arbitration in Switzerland, A Handbook for Practitioners, 2004, p. 12.

care of some of the unwanted developments, because at least the institutions themselves recognize their responsibility—which is also reflected in the observation that institutions constantly strive to revise and improve their rules in order to adapt them to new needs of the parties.

2. ROLE OF ARBITRATION RULES

2.1. Growing Number of Cases Administered by Leading Arbitral Institutions

The importance of the role of arbitral institutions is reflected in the fact that all major arbitral institutions boast growing case numbers in recent years. The following is a comparison of available figures for 2000, 2005 and 2010:

Institutions[5]	2000	2005	2010
ICC	541	521	793
AAA	515	580	888
LCIA	150	110	246
Swiss Chambers	--	54	89
CIETAC	633	979	1343

Thus, one can draw the conclusion that arbitral institutions are successful, and commercial arbitration as such does not have an acceptance problem in the international business community.

2.2. Institutions Would Be Well Advised to Take Criticism Seriously

Nevertheless, arbitral institutions are well-advised to take concerns of users seriously. A growing perception that arbitration is not a user-friendly dispute resolution mechanism could be highly detrimental. The effects of such a perception might not be cognizable immediately, but result in a slow erosion of the use of arbitration which will only manifest itself in future years.

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[5] These figures are from public sources, such as the ICC Arb. Statistical Report, ICC Bulletin, the Annual Report AAA (2010, p. 7, 2005, p. 7), the LCIA Director General's Report, and other internet publications of the various institutions.

It is thus of crucial importance that the arbitration community and, in particular, arbitral institutions work on the shortcomings of their rules, and, even more importantly, the way those rules are administered by the institutions and applied by arbitral tribunals acting under the auspices of a particular institution. In the following, I will endeavour to make some suggestions as to how this could be achieved. Statements by General Counsel of leading multinationals pronouncing that they would no longer favour arbitration as a dispute resolution mechanism[6] are alarming enough to cause the pertaining activities.

2.3. Rules of an Institution Provide the Basis for the Institutions' Influence on Proceedings

Most arbitration rules provide for the possibility of arbitral institutions to influence the proceedings in multiple ways[7]. As examples, the following can be mentioned:

- Prima facie examination of the existence of a valid arbitration clause when a request for arbitration is filed
- Determination whether one or three arbitrators are appointed
- Confirmation of arbitrators or the sole arbitrator nominated by the parties
- Confirmation of the chairman selected by either the co-arbitrators or the parties
- Appointment of arbitrators and/or the chairman if the parties or the co-arbitrators fail to make an appointment or cannot agree
- Determination of the advances on cost
- Examination and/or approval of organisational documents such as terms of reference, procedural rules and schedule of the arbitration
- Review of procedural orders; receipt of submissions and communications between the tribunal and the parties

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[6] Concern expressed by several high profile GCs at the occasion of the "Cost of International Arbitration Conference" organized by CIArb in London, 27/28 September 2011.

[7] Details can be found in the various rules, the actual versions of which can easily be found on the internet, as well as in publications analyzing commonalities and differences between different arbitration rules.

- Decision on challenges of arbitrators
- Replacement of arbitrators where necessary
- Review and/or approval of arbitral awards

What is lacking on that list, obviously, is the possibility to interfere or intervene in the actual course of the proceedings.

2.4. Procedural Freedom—Unrestricted?

It is a dogma in arbitration that the parties are free to structure the procedure and, in the absence of an agreement of the parties, the tribunal has discretion how to conduct the proceeding. Statutes and rules of several institutions establish that freedom expressly, others implicitly[8]. This principle of party autonomy is described by Redfern/Hunter as follows:

> "Party autonomy is the guiding principle in determining the procedure to be followed ... It is a principle that has been endorsed not only in national laws, but by international arbitration institutions and organizations."[9]

Does this mean that, without any restriction, there can be no influence of the institution on arbitrations running under its auspices?

Practical experience shows that, if a tribunal is not handling a case efficiently, there is very little that counsel and parties can do to intervene. One certainly has to bear in mind that criticism of the way the tribunal operates is a rather delicate thing: counsel certainly do not want to annoy a tribunal to the potential detriment of the client. Thus, any strong intervention and admonishment of the arbitrators must be carefully considered. Similarly, attempts to cause the institution to intervene can backfire if the arbitrators get the impression that counsel go behind the tribunal's backs and inform the institution about shortcomings of the work of the arbitrators.

Therefore, it seems desirable that institutions monitor the progress of arbitrations to a certain extent.

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[8] Article 19 (1) of the UNCITRAL Model Law, Article 182 PIL as well as Article 15 (1) Swiss Rules and Article 19 ICC Rules.

[9] Redfern/Hunter, Law and Practice of International Commercial Arbitration, 2004, p. 315.

2.5. How Can/Should Rules Be Revised?

Rules of several institutions provide for deadlines for the tribunals to render their award. A most famous example in that regard is the six-month deadline provided for in Article 30 (1) of the ICC Rules. Everybody knows, of course, that the time-limit is not enforced by the ICC, and that it is extended by the Secretariat without further ado.

The least an institution could and should do is to monitor the progress of arbitration on a regular basis, and inquire with the chairman of the tribunal if there is no discernible progress over a longer period of time. The pressure resulting from a call from the arbitral institution might already be sufficient to cause some action. If that does not help, more formal interventions, such as a letter from the Secretary General of the institution, can have the desired effect.

However, properly working incentives for arbitral tribunals to work efficiently would have to look differently. Therefore, arbitration institutions should provide for a basis to sanction tribunals who do not efficiently handle their cases.

The ultimate sanction, namely to relieve an arbitrator or a tribunal from its obligations, does not seem a viable option for various reasons. First, one would thus deprive the parties of the tribunal they have selected themselves (and by doing so violate one of the paramount principles of arbitration, namely the right to choose an arbitrator), and secondly, this would only cause further delay, i.e. defeat the very purpose of the sanction. Perhaps more realistically, one could consider a reduction of the arbitrators' fees in case they delay the process, particularly if the institution can establish that objective circumstances or the behavior of the parties or counsel were not decisive for the delay.

Experience shows that it is usually towards the end of a case when the tribunal's efficiency is truly tested: once the parties have done their work, submissions have been filed, hearings have been held, and post-hearing briefs have been submitted, the ball is with the arbitral tribunal, who has to come up with a reasoned award. That is the stage when most often frustration arises with the parties because they have to wait what they consider an eternity until they receive the final award.

A very practical suggestion for a tribunal in that context would be to already start analyzing legal issues and draft, for example, the procedural history and the (undisputed) factual background of the case even before hearings are held. By doing so, a tribunal would not only do work that has to be done for the final award anyway, but

would also, in all likelihood, sharpen its eyes for the real issues in preparation of the hearing.

3. ORGANIZATION OF ARBITRAL INSTITUTIONS

3.1. Professionalism Is Absolute Key

Principal task of any arbitral institution is to administer the cases that are handled under its auspices. In order to do so, an institution needs a professional organisation, i.e. well-trained staff fluent in all languages that are showing up in those cases, and with sufficient legal knowledge to make the necessary determinations at the outset of a case, before an arbitral tribunal takes charge. All administrative steps must be taken without undue delay, which in my view means within 24 to 48 hours after any filing is received. To make that possible, it is clear that an institution needs sufficient staff to make sure that there are no dead times due to vacations and holidays. It is unacceptable that the secretariat of an institution is not operative for longer periods of times and thus not able to deal with incoming communications from parties or arbitrators.

It goes without saying that the representatives of the institution must not only be equipped for their task, but they must also be trustworthy and reliable. Often, they have to deal with highly confidential information, and their integrity to maintain that confidentiality must be out of question. Moreover, they must be strictly neutral, which also means that they are not allowed to have *ex parte* communications with counsel from one side excluding the other side on anything substantial. As a rather frustrating example for the lack of discretion of the staff of the ICC, one can mention an inquiry in Paris regarding the role of a so-called ICC Regional Director, acting as opposing counsel in an ICC arbitration (apparently this is allowed), which was immediately reported by the staff of the ICC to that person, who then referred to it in one of his submissions in the arbitration. Clearly, an institution should avoid any appearance that members of that institution get preferential treatment or have insider connections to the staff of the institution.

Another element that must be ascertained is that the communications from the institution are clear and present themselves in a way which creates confidence. Most institutions have standard letters which they send out when a request for arbitration is received, when deadlines are fixed, and when appointments of arbitrators are made. It is certainly good practice to make sure that such communications are drafted professionally in order to increase the acceptance and the

confidence of the parties. Parties and counsel must be given the impression that their dispute is administered in a professional and efficient way, and the manner in which institutions communicate goes a long way to establish such trust.

There was a period in the 90's of the last century when, after the fall of the iron curtain, arbitral institutions popped up in almost every country of the former east block. While it was certainly commendable that the legal community in those countries started to embrace arbitration, it was exactly the professionalism described here which was missing, and thus it was clear from the outset that such institutions would not have a great impact on the market. Indeed, very few of those new arbitral institutions have gained any importance for the international business community, and many of them have in the meantime disappeared.

3.2. Bifurcation between Day-to-Day Management of Cases and Extraordinary Situations Such as Challenges

Many of the tasks of the secretariat of arbitral institutions are of routine nature. No particular legal experience is necessary to fulfil those tasks, and a diligent and attentive staff can certainly handle these tasks. On the other hand, considerable arbitration law experience is required to make certain determinations necessary at the outset of a case. For example, the institution must form a view whether the arbitration clause on which the requesting party relies is a valid arbitration clause referring to institutional arbitration under the rules of that particular institution. Moreover, the appointment of the arbitrators requires knowledge and understanding of the underlying rules, coupled with the provisions agreed upon by the parties in the underlying contract. Practical experience shows that in at least a third of the cases those issues are not completely straight forward, and need certain determinations.

Let us have a look at how two institutions organize their work, namely the ICC on one hand and the Swiss Chambers on the other hand.

The Secretariat of the ICC is lead by the Secretary General of the ICC Court, who handles, together with his staff, the so-called counsel, the day-to-day administration of the pending ICC cases. They take decisions on matters which are not contentious such as the confirmation of arbitrators who have filed unqualified statements of independence, or qualified statements which do not give rise to objections. Moreover, they handle the advances payable by the parties, and extend the time limits to render the award. Finally, they prepare reports for the Court regarding the decisions to be taken by the Court.

The ICC Court, on the other hand, handles the more far fetching and complex decisions, such as determination of the existence of a *prima facie* agreement to arbitrate, appointment of arbitrator, determination of the place of arbitration, determination of fees and expenses of the arbitrator, approval of terms of reference, decisions regarding challenges against arbitrators and, most importantly, the approval of awards.[10]

Under the Swiss Rules, there is a similar setup. Each Chamber's tasks are handled by the legal secretary of the Chamber where the case has been filed. For certain issues to be decided, one of the members of the so-called Arbitration Committee (consisting of around 30 experienced practitioners of international arbitration) acts as rapporteur who assists the Chamber (i.e. the legal secretary) in the administration and monitoring of the arbitration proceeding. Finally, there is the so-called Special Committee, consisting of lawyers with "very important international arbitration experience", which decides for example on challenges and revocation of arbitrators, the seat of arbitration, whether there is manifestly no agreement to arbitrate or if cases are consolidated, and advises the Chambers on other procedural matters that may arise in relation to the application of the Swiss Rules[11].

Both institutions reach their goal, namely to make sure that routine tasks are handled efficiently, and that more complex issues are analyzed and determined by an experienced body.

4. APPOINTMENT AND CONFIRMATION OF ARBITRATORS

4.1. The Ability to Choose an Arbitrator (Almost) without Any Restrictions Is a Crucial Element of All Major Arbitration Rules

It is a common feature of all major arbitral rules that the parties have unrestricted freedom to choose their arbitrator and/or to determine the arbitrator selection process in a way which differs from what the chosen rules establish. In that context, one remark to illustrate the effect of this situation.

In order not to frustrate the parties' right to nominate their arbitrator, arbitration rules contain relatively long and even extendable time-limits for the parties to make their choice. Reference can be made,

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[10] For a detailed discussion, see Craig/Park/Paulsson, International Chamber of Commerce Arbitration, 2001, p. 19 et seq.

[11] For a detailed description, see Zuberbühler/Müller/Habegger, Swiss Rules of International Arbitration, Commentary, N 12 et seq. of the Introduction.

in that context, to the Swiss Rules, according to which a party has, under certain circumstances, up to 60 days to make its appointment.

The result is that, in order to respect the parties' right to nominate their own arbitrator, most rules establish a process which might take three to four months, added all together, until a tribunal has finally been selected. This is a long time period where, moreover, nothing else happens that advances the adjudication of the matter. As we will see below, that time is usually also not counted when the time-limit for the claimant to file its statement of claim is determined. This is certainly not satisfactory.

4.2. Focus on Independence

While the parties have freedom to appoint their own arbitrators, most rules contain some sort of a confirmation process, according to which the arbitrators chosen by the parties need to be confirmed by the institution. Practical experience shows that arbitral institutions are not overly critical when looking at the actual qualities of an arbitrator. They do require a statement of independence and impartiality (the wording used in various rules differs), but as long as a party-appointed arbitrator is able to confirm that he is independent and impartial, he will almost inevitably be confirmed by the institution.

What is not checked by the institution is whether the candidate is actually personally and professionally qualified to act as an arbitrator in the dispute at hand. In many instances, this will not be necessary because the party nominating an arbitrator has an evident interest to nominate a duly qualified arbitrator, and will thus select an arbitrator whose experience is above question. This, however, is not always the case. Sometimes the parties choose somebody who they believe is "in their pocket", i.e. an arbitrator who will unwaveringly support the position of the party who nominated him in the discussions within the tribunal. There is little an institution (or the opposing party) can do against this, unless there is a demonstrable appearance of lack of independence or impartiality.

4.3. Should an Institution Not Confirm an Arbitrator Simply Because He or She Is Known to "Suffer" from a Heavy Workload?

Recently, there were indications that at least the ICC takes a more determined stance vis-à-vis arbitrators who were slow in fulfilling

their tasks.[12] Obviously, the ICC, with its relatively close involvement in the proceedings (contrary to other institutions, the ICC requires copies of every single document filed by the parties or sent out by the tribunal), is in an excellent position to assess the efficiency of any particular tribunal. For example, the ICC Court sees exactly how much time lapses between the receipt of post-hearing briefs and the submission of a draft award to Paris.

The interesting question is whether parties accept a non-confirmation by the ICC of an otherwise well-reputed chairman of the tribunal based on previous experiences made by the ICC with that particular arbitrator. The undersigned has been involved in a case where the parties jointly and expressly requested the arbitral institution to confirm a chairman in spite of a situation (known to the parties) which was qualified by the institution as a conflict of interest.

4.4. Party-Appointed Arbitrators Are Rarely the Reason for Delay; Even High-Profile Arbitrators Are Usually Responsive and Provide Efficient Input

In terms of party-appointed arbitrators, I should state here that, in my experience, the party-appointed arbitrators are rarely the reason for major delays in proceedings, except when it comes to finding suitable hearing dates (see below). Even high-profile arbitrators with a heavy workload are usually very responsive, and support the chairman with input whenever necessary.

4.5. Availability for Hearings, Particularly for Hearings Scheduled as a Matter of Urgency, as a Main Problem

The main reason for the long duration of arbitration proceedings is not the availability of the arbitrators or undue delays when they perform their tasks. It is, quite frankly, the long time-limits requested by the parties or, more particularly, counsel representing parties in arbitration. It is quite a typical occurrence that, when procedural hearings or case management conferences (see Article 24 (1) ICC Rules) take place, and one reaches the point where time-limits are discussed, counsel request quite long deadlines to file their submissions. In spite of the fact that the claimant already had ample time to prepare its case, two months for a detailed statement of claim seems to be the minimum, more often the requested time is three months or even four.

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[12] As a first step taken by the ICC to ensure availability, arbitrators must specifically confirm their availability as part of their Statement of Independence since January 2010.

Naturally, respondents then ask for an equal time period, and thus already the briefing part of the proceedings takes up to 18 months. Under these circumstances, one cannot reasonably expect to finish proceedings within a year ... (not to mention the six months mentioned in Article 30 (1) of the ICC Rules).

5. SELECTION OF THE CHAIRMAN

5.1. Role of Chairman Is Absolutely Crucial

The role of the chairman of an arbitral tribunal cannot be overestimated[13]. In particular, his role is crucial and decisive in at least three phases of an arbitration:

5.1.1. Organisation of the proceedings

When an arbitral tribunal has been composed in accordance with the agreements of the parties in their arbitration clause or in accordance with the arbitration rules chosen by the parties, the tribunal begins its work under the guidance of the chairman of the tribunal. It is primarily his task to draft the organisational documents (Terms of Reference, Procedural Rules, Constitutional Orders, Schedules, etc.) and to discuss them with his co-arbitrators and thereafter with the parties. The chairman has to make sure that these documents are drafted and decided upon in mutual agreement between the arbitrators and the parties, and that this happens within a reasonable timeframe. If a case management conference or procedural hearing is held, the invitation to such hearing, the organization, and the conduct of the hearing will very much in the chairman's hands.

A good chairman will make sure that all the steps described above are taken within one or two months from the moment that the tribunal is operational. More delay is not desirable and will set a bad precedent for the efficient conduct of the remainder of the proceedings. It is important not only that the chairman has the necessary capacity to take care of the matter immediately when it comes into his hands, but also that he shows determination to make sure that both his co-arbitrator and counsel to the parties make themselves available to efficiently deal with these initial steps of the proceedings.

Crucial in that context is the schedule which is usually established together with the parties either at a physical hearing or at a conference call, and which in many instances has to be submitted to the arbitral

[13] Of course the male form used here always also refers to female chairpersons.

institution (see below). Again, one would hope that the chairman makes sure that neither party uses the schedule to delay the administration of the case by insisting on unreasonably long deadlines. This is particularly important in relatively small matters, where an initial analysis of the case would show that in fact the case should be dealt with rather swiftly. Nothing is more frustrating for a claimant than walking away from a procedural hearing realizing that the earliest he can possibly hope for a decision is at least two years down the road. This is simply not what parties expect from arbitration, and this has a very negative effect on the acceptance of arbitration as an efficient dispute resolution mechanism. If a case turns out to be complex and the pleadings are long, with a large number of exhibits and witnesses, it is clear that some time will be required to go through the proceedings. On the other hand, if this is not the case, if the facts are simple, legal questions are at the core, or only very few documents and witnesses are needed to determine the issues before the tribunal, there is simply no excuse that such a case would take two years or more to decide.

The Swiss Rules provide in Article 42 for an expedited procedure applying in cases where the amount in dispute does not exceed one million Swiss Francs or if the parties so agree. The essential features of the expedited procedure are that there are short time limits for the appointment of arbitrators, there is only one statement of claim and one statement of defence (so-called simple exchange of briefs), a single hearing for the examination of witnesses and expert witnesses as well as for oral arguments, and the award shall be made within six months from the date when the Chamber transmits the file to the sole arbitrator. Finally, the reasons upon which the award is based must only be stated in summary form by the sole arbitrator, unless the parties agree that no reasons are to be given at all. The experience made with the expedited procedure is positive; it has turned out that it is in fact possible to conduct arbitrations that way if everybody involved plays by the rules. One could consider to increase the threshold amount for the expedited procedure from one million to three or five million Swiss Francs in order to make sure that even more cases are administered in that expedited way.

To make sure that the arbitration gets under the way in the right manner is the core responsibility of the chairman of the tribunal, whose only and noble obligation is the fair, equitable and efficient administration of arbitration proceedings.

5.1.2. Conduct of the proceedings

Sometimes, arbitrations run exactly along the course determined at the outset, the schedule is maintained, the hearing is held without any particular procedural issues, the parties are able to present their case without any hitches, and finally the tribunal deliberates and renders an award. However, this is often not the case.

It is the chairman of the tribunal who has the primary responsibility to deal with procedural matters that come up in the course of an arbitration. Obviously, depending on what has been determined at the outset, he has to consult his co-arbitrators at any stage of the proceedings, and is (unless specifically empowered) not authorized to determine procedural issues on his own. On the other hand, it is the chairman who has to immediately get active if procedural issues are raised by the parties. If extensions of time limits are requested production of document requests are made with submissions or separately, if other issues are brought up by the parties, it is the chairman who has to immediately make sure that such requests are dealt with properly, which usually means that he first gives the other side a deadline to comment on those procedural issues (usually, such deadlines are shorter and run parallel to other deadlines to make substantial submissions). Again, precious time can be lost if the chairman does not react swiftly to such issues, and fails to deal with them properly and in a way which does not cause delay for the proceedings in general.

5.1.3. Conduct of hearings

The other important task of the chairman during the course of the arbitration is the organization of substantive (or procedural) hearings. Parties expect to get an opportunity to present their case live in a hearing before the tribunal. This not only includes the examination of witnesses and experts (which are often the most important agenda items at hearings), but also the opportunity to present its position orally and in person. Depending on the cultural background of parties, this can be a very crucial element for the later acceptance of an award. If a party has had the opportunity to see the tribunal, to present its arguments, and to realize that the arbitral tribunal has studied the file and has endeavoured to understand the parties' positions, this is a very important factor in making sure that parties feel taken seriously and that they had “their day in court”.

The chairman's tasks in connection with hearings are twofold: First, he has to determine a convenient date (providing for sufficient,

but not too many, days for the hearing), a venue suitable and professionally equipped for a hearing, a court reporter, possibly food, lodging and sometimes even visa for the parties and witnesses to travel to the place of the hearing. All of these tasks, if not handled properly, will make it burdensome and impossible to have a successful and satisfactory hearing. Often, the tasks linked to the organization of the hearing, can be handled by an assistant to the chairman.

The second task of the chairman is to actually conduct the hearing as the "master of ceremonies". He has to make sure that both parties get a fair opportunity to present their case, to provide them with the opportunity to ask questions to witnesses, to make sure that witnesses are treated properly, and to keep up general discipline in the hearing room. What might sound trivial can be a tricky exercise in some cases, and a chairman with an equitable but strong hand is an asset if arguments get heated and the hearing threatens to get out of control.

5.1.4. Preparing and drafting the Final Award

Finally, the chairman has to lead the tribunal through the deliberation process. In that context, he has to make sure that both co-arbitrators get a full opportunity to present their view on the matter, and make sure that the arguments are exchanged in a way that ideally allows the tribunal to come to a unanimous decision. Where that is not possible, the chairman must respect the minority arbitrator's position (which usually is not the chairman himself, but that could also happen): If so desired by the dissenting co-arbitrator, the latter must get an opportunity to present his dissenting opinion either within the award itself or in a separate document.

Regardless of whether the decision unanimous or not, it is usually the chairman who drafts larger parts if not the whole text of the award.[14] Again, this is a task which cannot be underestimated. It is one thing to come to a general view on how the case is to be decided; it is quite another challenge to put this decision into the form of an arbitral award fully reflecting the factual and legal issues that were determined. We have heard from Mr Greenberg that the ICC Court exercises quite some degree of control over the drafting process and monitors and reviews the final awards before they are dispatched to

[14] The ICC has published a useful tool to assist the drafter, a checklist for drafting arbitral awards, which is sent to appointed arbitrators since March 2010.

the parties[15]. Other institutions provide for little or no control in that regard. Thus, most if not all the responsibility in that area lies with the chairman. The art of drafting an arbitral award is one that certainly warrants more attention that can be given here within this short article.

5.2. Non-confirmation of Chairman for Performance Related Issues Seems Rare

In the preceding section, I have emphasized the crucial role for the chairman of the tribunal for the course of the proceedings. The fact that there is a lot of dissatisfaction, which is the premise of this Conference, would indicate that there are a considerable number of chairmen who do not live up to their task. I cannot express a view in that regard; my own personal experience is quite positive, and I am generally satisfied with the work done by chairmen in arbitrations where I am involved as either counsel or co-arbitrator.

Nevertheless, one hears about cases and sometimes experiences situations where the chairman could do a better job. Finally, there are even cases where the complaints are of a nature that indicates that the chairman was indeed not doing his job properly.

So far, there have been very few reported instances where such a chairman was censored or put to responsibility by the arbitral institution.

5.3. Selection of a Chairman Who Has the Abilities and the Availability Necessary to Lead the Proceedings

In light of the foregoing remarks about the importance of the qualities of a chairman, it is obvious that the selection of the chairman is one of the key decisions taken at the outset of a case. In most cases, the chairman can be chosen by the party-appointed arbitrators, and quite frequently (at least in Continental Europe) co-arbitrators solicit the views of counsel who appointed them as regards their ideas of a possible chairman for the tribunal.

It is thus the responsibility of both co-arbitrators and counsel to carefully consider the qualities of the chairman they select. This not only includes the professional capacities and experience of a chairman, but also his availability to devote the time necessary to the case.

On the other hand, arbitrators are also called upon not to accept cases in situations where they are already overly burdened with work. It would seem unprofessional to accept the noble task of being the

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[15] See Simon Greenberg, Arbitral Award Scrutiny under Scrutiny, Chapter 6, **pp. .... et** seq., discussing in detail how the ICC Court exercises its powers granted by Article 33 of the ICC Rules.

chairman of a tribunal if one does not realistically have the necessary time to devote to the matter. This would not only be a disservice to the institution of arbitration, but also reflect badly on the person of the arbitrator, and tarnish his reputation. Certainly, no co-arbitrator or counsel would ever reconsider a chairman who was perceived not to do his job properly in a particular case. In that regard, confidentiality of an arbitration is not necessarily an advantage; only a limited number of people will actually learn about a bad experience, and it is quite likely that such arbitrators will get appointments from other sources who are unaware of their recent bad performance. While one generously says that a good reputation is lost quickly, this might not necessarily hold true for arbitrators who have built up a reputation over time; that reputation might still be intact in spite of negative experiences made by some parties.

6. ADMINISTRATIVE STEPS AT THE OUTSET

6.1. Appointment and Confirmation of the Tribunal Should Run as Smoothly and Quickly as Possible

The time necessary to get an arbitration under way (which in my definition would be the point in time when the file is passed from the institution to the fully operational arbitral tribunal) varies greatly between one and sometimes six months. Clearly the latter is too long, but can be the result of the relatively generous time limits to file the answers to the request for arbitration and/or to appoint arbitrators, and the difficulties encountered when deciding on a chairman. It is clear the time lost at the outset of the case can never be recovered; if the selection of the tribunal takes six months, the overall time necessary to adjudicate the matter will be quickly close to two years in the end of the day, even if the tribunal handles the case relatively efficiently.

It is my view that the time limits provided for in the various institutional rules are rather too long, and the extension possibilities to file answers to a request for arbitration, for example, should be shortened. How much time does it really take to inform an institution that a respondent disputes the claim in its entirety, and to nominate a co-arbitrator? Certainly not two months, one would suspect.

6.2. Appointment Process Should Run in Parallel with Initial Briefings and Advance Payments

The institution should make sure that the initial briefing to the institution (Request for Arbitration, Answer and Counterclaim, Answer

to Counterclaim), the selection of the arbitrators, and the payment of advances run in parallel.

6.3. Transfer of File to Tribunal as Soon as Submissions Arrive

There is no reason not to immediately transfer submissions that arrive with the arbitral institution to the arbitrators. Waiting to do so until the briefing to the institution is complete and/or all advances have been paid is time lost for the tribunal to already start preparing documents such as the terms of reference and constitutional orders.

7. MONITORING OF THE PROCEEDINGS

7.1. Extent to Which Institutions Are Keeping Themselves Informed Differs— from Receipt of Everything to Complete Waiver of Information

While some institutions keep involved in the case and request copies of every submission, procedural order, request for extension of time limits etc., others limit themselves to requesting a copy of the final award at the end of the case. As an example for the former attitude, one can refer to the ICC, as an example for the latter to various other institutions. Swiss Rules arbitration tends to follow the second practice; however, the Swiss Chambers request to be consulted on the arbitral tribunal's fee.

7.2. The Time-limits to Render an Award Seem to Be of Little Effect

As an example for a provision establishing a time limit to render an award, reference can be made to Article 30 (1) of the ICC Rules.

In practice, however, such rules seem to have little or no effect. Arbitral tribunals do not bother about the expectation for finish a case within six months, and apparently neither do counsel involved in arbitration. It is very rare an exceptional that arbitrators and counsel actually endeavour to finish a case within six months.

7.3. Schedule of the Proceedings

The establishment of a schedule for the entire arbitration at the outset of the case up to the final award is critical. Many institutions

insist on receiving such a document from the arbitral tribunal is an important measure to streamline the proceedings.[16]

In my experience, such a preliminary schedule is of great value. Particularly if it is wisely chosen after discussion with the parties at a case management conference or procedural hearing, and even more particularly, if the arbitral tribunal then also remains relatively steadfast in refusing extensions and delays that would render the preliminary schedule obsolete.

The following is a schedule for a relatively simple, straight forward case, providing for a so-called "double exchange of submission" (i.e. each party gets to make two full submissions, but no separate proceeding regarding production of documents):

Detailed Statement of Claim	90 days
Answer	90 days
Reply incl. Witness Statements / Expert Reports, if any	60 days
Rejoinder incl. Witness Statements / Expert Reports, if any	60 days
Conference Call to prepare Hearing	15 days
Hearing (5 days)	30 days
Post-Hearing Briefs	30 days
Final Award	30 days
Total time until Final Award is dispatched	**400 days**

7.4. No Input from the Institutions on the Procedure Chosen by Tribunal/Parties

As a matter of principle, institutions do not actively influence the tribunal (and/or the parties) regarding the procedure they have chosen. Procedural autonomy allows the parties and the tribunal to adopt a taylor-made procedure and this is usually positive.

Of course, one can imagine cases where a tribunal is not able to manage the case properly, where an appeal of one of the parties to the institution could be helpful. However, leading arbitral institutions surprisingly provide no structures that would allow such appeals.

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[16] Reference can be made, for example, to Article 24 (2) ICC Rules and Article 15 (3) Swiss Rules.

8. MAJOR PITFALLS

The following is an enumeration of factors which, in my experience, contribute most frequently to proceedings which do not fulfill the parties' legitimate expectations.

8.1. Tribunal's Limited Availability and Lack of Efficiency

Experienced and well-known arbitrators often have heavy burden of cases both as arbitrators and counsel. The problem with arbitration engagements is that they frequently block out entire weeks which are reserved for hearings. If hearing dates must be found involving three busy arbitrators, counsel on both sides who also have a full agenda, and possibly also party representatives who are unavailable for reasons of local holidays, the identification of suitable hearing dates can become a thorny exercise.

Thus, I would like to renew my *desideratum* that not only counsel, but particularly arbitrators only accept appointments where they actually have the availability required to participate in the proceedings.

The second point is that the tribunal, but also counsel, do not work with sufficient efficiency. Time limits are there to be respected, and decisions that need to be taken by the tribunal should be taken swiftly and with all due speed. It is not acceptable that one has to wait for decisions on procedural matters for two or more months in the middle of a case.

8.2. Counsel's Availability

While the primary blame is often put on the arbitrators, counsel are also not always as available as one would hope. This is particularly serious in situations where the clients would actually desire efficient proceedings. I have been in procedural meetings where a client was sitting next to his attorney, and had to realise with growing exasperation that time limits got longer and longer, and hearings were put back in the calendar because his own lawyer did not have the time to work on submissions and/or availability for hearing dates suggested by the tribunal.

In those situations, one sometimes wonder whether clients do not realize that the best attorney is not a good choice if he or she does not have the time for that client's case. There is no scarcity of able arbitration counsel in Europe; to choose one who does not have time for one's case is simply a bad decision which still can be reversed at the outset, but possibly not in the middle of the case.

8.3. Extensive Document Production Process

I do not want to get into a lengthy discussion of the pros and cons of document production. There are many authors who have done so in recent years, and have lamented the fact that arbitration has turned into US style litigation because of document production.

It is clear, however, that document production can delay a matter, particularly if the tribunal does not deal with document production requests swiftly.

8.4. Lengthy and Redundant Witness Evidence

It is crystal clear that all witnesses who are relevant to adjudicate a dispute must be heard, and that the opposing party must be given an opportunity to cross-examine those witnesses.

On the other hand, it is unnecessary to extend witness examinations in a way which does not contribute to the determination of those crucial issues. Most arbitrations nowadays recognize written witness statements. Those written witness statements are intended to replace direct examination of the witnesses on which a party relies. Thus, it is in my view almost always unnecessary to allow a direct examination, except possibly for a short opportunity for warm-up questions (15 to 30 minutes maximum).

Moreover, where multiple witnesses cover similar areas, or where witnesses cover areas which are not disputed or not dispositive in the eyes of the tribunal, the tribunal should aim at obtaining waiver from the parties to examine those witnesses.

8.5. Dilatory Tactics of Parties/Counsel

A rather dark chapter is the measures taken by parties to delay proceedings. One cannot avoid that particularly respondents who fear the proper adjudication of a dispute embark on all sorts of tactics to delay the proceedings and, in severe cases, even derail the proceedings in order to later attack an award or, as sometimes happens, to avoid the rendering of an award all together.

Reference can be made, regarding that topic, to a seminar organized by the ICC in Vienna in 2010.[17] Prominent practitioners described the most notorious mechanisms, and suggested measures against them.

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[17] Guerilla Tactics in International Arbitration and Litigation, 12/13 November 2010.

As with other topics discussed in this article, it is my view that it is the paramount responsibility of the tribunal, and particularly the chairman, to deal with such attempts in a way which safeguards the proceedings and the rights of the parties, particularly the claimant in cases where the respondent delays. Sometimes, the tribunal has to walk a fine line between defending against such tactics and nevertheless maintaining the balance of the proceedings. One has to avoid falling into a trap to simply discount a party because it tries to delay the proceedings, thus actually playing into the hand of that party.

8.6. Delays in Issuing Awards

Finally, one of the most crucial delaying factors in arbitration is the long time it sometimes takes for arbitral tribunals to render their award. It is not uncommon to wait for six months or more after the filing of the post-hearing briefs, and 9 months after the hearing.

From my experience, the following measures for the chairman to speed up the decision making and drafting process are suggested:

- Start preparing parts of the award (such as the procedural history and the undisputed facts) already early in the case;
- At the end of the hearing, establish a firm timetable for the deliberations and drafting process;
- Reserve specific dates for deliberation meetings, where necessary.
- Discuss the case within the tribunal immediately after the hearing, so that the general views of the arbitrators are on the table when you start drafting;
- Reserve time for drafting an award in your calendar, for example one full week, about 3 weeks after the post-hearing briefs are scheduled;
- Solicit input from the co-arbitrators in writing in order to have a clear understanding of their positions;
- Delegate the drafting of parts of the award to your co-arbitrators if appropriate;
- Focus the award on the crucial issues;
- Avoid unnecessary lengthy summaries of arguments and quotes from submissions.